RULE 3001. Proof of Claim

** See rule committee discussion notes beginning on page 10**

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(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing*. When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) *Additional Statements Required.*

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred prior to the date of the petition, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in property of the debtor, the proof of claim shall include a statement of the amount necessary to cure any default as of the date of the petition.

(C) If a security interest is claimed in property that is the debtor's principal residence and an escrow account has been established in connection with the claim, the proof of claim shall be accompanied by an escrow account statement prepared as of the date of the filing of the petition, in a form consistent with applicable

nonbankruptcy law.

(3) *Failure to Provide Supporting Information.* If the holder of a claim fails to provide the information required in subdivision (c) of this rule, the holder may not present that information, in any form, as evidence in any hearing or submission in any contested matter or adversary proceeding in the case, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, after notice and hearing, may award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

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COMMITTEE NOTE

Subdivision (c) is amended to prescribe with greater specificity the supporting information required to accompany a proof a claim and the consequences of failing to provide the required information. When the holder of a claim seeks to recover – in addition to the principal amount of a debt – interest, fees, expenses, or other charges, the proof of claim must be accompanied by a statement that itemizes these additional amounts. The itemization must be sufficiently specific to make clear the basis for the claimed amount.

If a claim is secured by property of the debtor and the debtor defaulted on the claim prior to the filing of the petition, the proof of claim must be accompanied by a statement of the amount required to cure the prepetition default. In the case of a claim secured by the debtor's principal residence, if an escrow account has been established in connection with the claim, the proof of claim must be accompanied by an escrow account statement showing the account balance and any amount owed as of the date of the filing of the bankruptcy petition. The statement shall be

prepared in a form consistent with the requirements of nonbankruptcy law. *See, e.g.,* 12 U.S.C. § 2601 *et seq.* (Real Estate Settlement Procedure Act).

A creditor who files a proof of claim and fails to provide any of the information required by subdivision (c) will be subject to the imposition of sanctions by the court. The creditor will be precluded from introducing into evidence or submitting in any form the omitted information at any trial or hearing in the bankruptcy case, unless the failure was substantially justified or is harmless. The court in its discretion, after notice and hearing, may award other appropriate relief, including costs and attorney's fees caused by the creditor's failure to provide the required information, in lieu of or in addition to the specified sanction.

RULE 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) NOTICE OF PAYMENT CHANGES. In a chapter 13 case, if a claim secured by a security interest in the debtor's principal residence is provided for under the debtor's plan pursuant to § 1322(b)(5) of the Code, the holder of such claim shall file and serve on the debtor, debtor's counsel, and the trustee notice of any change in the payment amount, including changes that result from interest rate and escrow account adjustments, at least 30 days before a payment at a new amount is due.

(b) FORM AND CONTENT. Any notice filed and served pursuant to subdivision (a) of this rule (1) shall conform substantially to the form of notice under applicable nonbankruptcy law and the underlying agreement that would be given if the debtor

were not a debtor in bankruptcy, (2) shall be filed as a supplement to the holder's proof of claim, and (3) shall not be subject to Rule 3001(f).

(c) NOTICE OF FEES, EXPENSES, AND CHARGES. In a chapter 13 case, if a claim secured by a security interest in the debtor's principal residence is provided for under the debtor's plan pursuant to § 1322(b)(5) of the Code, the holder of such claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice containing an itemization of all fees, expenses, or charges incurred in connection with the claim after the filing of the bankruptcy case that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be filed as a supplement to the holder's proof of claim and sent within 30 days after the date when such fees, expenses, or charges are incurred. The notice shall not be subject to Rule 3001(f). On motion of the debtor or trustee filed no later than one year after service of the notice given pursuant to this subdivision, after notice and hearing, the court shall determine whether such fees, expenses, or charges are required by the underlying agreement and applicable nonbankruptcy law for the curing of the default or the maintenance of payments in accordance with § 1322(b)(5) of the Code.

(d) NOTICE OF FINAL CURE PAYMENT. Within 30 days of making the final payment of any cure amount made on a claim secured by a security interest in the debtor's principal residence, the trustee in a chapter 13 case shall file and serve upon the holder of the claim, the debtor, and debtor's counsel a notice stating that the amount required to cure the default has been paid in full. If the debtor contends that the final cure payment has been made and the trustee does not file and serve the notice required by this subdivision within the specified time period, the debtor may file and serve upon the holder of the claim and the trustee a notice stating that the amount required to cure the default has been paid in full.

(e) RESPONSE TO NOTICE OF FINAL CURE PAYMENT. Within 21 days of service of the notice given pursuant to subdivision (d) of this rule, the holder of a claim secured by a security interest in the debtor's principal residence shall file and serve a statement indicating whether the debtor has paid in full the amount required by the underlying agreement and applicable nonbankruptcy law for the curing of the default and the maintenance of payments in accordance with § 1322(b)(5) of the Code. If applicable, the statement shall contain an itemization of any required cure or postpetition amounts that the holder contends

remain unpaid in connection with the security interest as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and shall not be subject to Rule 3001(f).

(f) MOTION AND HEARING. On motion of the debtor or trustee filed no later than 21 days after service of the statement given pursuant to subdivision (e) of this rule, after notice and hearing, the court shall determine whether the debtor has cured the default and paid in full all postpetition amounts required by the underlying agreement and applicable nonbankruptcy law in connection with the security interest.

(g) FAILURE TO NOTIFY. If the holder of a claim secured by a security interest in the debtor's principal residence fails to provide information required by subdivision (a), (c), or (e) of this rule, the holder may not present that information, in any form, as evidence in any hearing or submission in any contested matter or adversary proceeding in the case, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, after notice and hearing, may award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

COMMITTEE NOTE

This rule is new. It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan.

In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee must be informed of the exact amounts needed to cure any prepetition arrearage, *see* Rule 3001(c)(2), and the amounts of the postpetition payment obligations. If the latter amounts change over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of those changes in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if necessary, and to adjust postpetition mortgage payments to cover any properly claimed adjustments. Compliance with the notice provisions of the rule should also eliminate any concern on the part of the holder of the claim that informing a debtor of changes in postpetition payment obligations might violate the automatic stay.

Subdivision (a) requires the holder of a claim secured by the debtor's principal residence to notify the debtor, debtor's counsel, and the trustee of any postpetition changes in the mortgage payment amount. This notice must be provided at least 30 days before the new payment amount is due.

Subdivision (b) provides the method of giving the notice of a payment change. The holder of claim must give notice of the change in substantially the same form that would be used according to the underlying agreement and nonbankruptcy law if the debtor were not a debtor in bankruptcy. In addition to serving the debtor, debtor's counsel, and the trustee, as required by subdivision (a), the holder of the claim must also file the notice of payment change on the claims register in the case as a supplement to its proof of claim. Rule 3001(f) does not apply to this notice, and therefore it will not constitute prima facie evidence of the validity and amount of the payment change.

Subdivision (c) requires an itemized notice to be given of any postpetition assessment of fees, expenses, or charges in

connection with a claim secured by the debtor's principal residence. Such amounts might include, for example, inspection fees, late charges, and attorneys fees. The holder of the claim must serve a notice itemizing any such postpetition fees on the debtor, debtor's counsel, and the trustee within 30 days after the charges are incurred. Notice must also be filed on the claims register as a supplement to the creditor's proof of claim. Rule 3001(f) does not apply to this notice, and therefore it will not constitute prima facie evidence of the validity and amount of the postpetition fees, expenses, and charges.

Within a year after service of a notice under subdivision (c), the debtor or trustee may move for a court determination of whether the fees, expenses, or charges are required by the underlying agreement or applicable nonbankruptcy law to cure a default or maintain payments.

Subdivision (d) requires the trustee to issue a notice within 30 days after making the last payment to cure a prepetition default on a claim secured by the debtor's principal residence. This notice, which must be served on the holder of the claim, the debtor, and the debtor's counsel, provides that the amount required to cure the default has been paid in full. If the trustee fails to file this statement within the time required by the subdivision, a debtor who contends that the prepetition default has been cured may file and serve the statement on the holder of the claim and the trustee.
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Subdivision (e) governs the response of the holder of the claim to the trustee's or debtor's notice under subdivision (d). Within 21 days after service of notice of the final cure payment, the holder of the claim must file and serve a statement indicating whether the prepetition default has been fully cured and whether postpetition amounts have been paid in full in accordance with § 1322(b)(5). If the holder of the claim contends that either amount has not been paid in full, its response must include an itemization of all missed amounts. The claim holder's responsive statement must be filed on the claims register as a supplement to the creditor's proof of claim and served on the trustee, the debtor, and the debtor's counsel. Rule 3001(f) does not apply to this statement, and therefore it will not constitute prima facie evidence of the validity and amount of the allegedly unpaid cure or postpetition obligations.

Subdivision (f) provides the procedure for the judicial resolution of any disputes that may arise about the payment of a claim secured by the debtor's principal residence. The trustee or debtor may move no later than 21 days after the service of the statement under (e) for a determination by the court of whether the prepetition default has been cured and whether all postpetition obligations have been fully paid.

Subdivision (g) specifies sanctions that may be imposed if the holder of a claim secured by the debtor's principal residence fails to provide any of the information required by subdivisions (a), (c), or (e). The holder of the claim will be precluded from introducing into evidence or submitting in any form the omitted information at any trial or hearing in the bankruptcy case, unless the failure was substantially justified or is harmless. The court in its discretion, after notice and hearing, may award other appropriate relief, including costs and attorney's fees caused by the creditor's failure to provide the required information, in lieu of or in addition to the specified sanction.

If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (g).

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: MORTGAGE PAYMENTS IN CHAPTER 13 CASES

DATE: AUGUST 27, 2008

Judge Wedoff raised for consideration by the Subcommittee whether there is a need for a national rule that would provide procedures for the disclosure of and adjudication of disputes regarding postpetition mortgage fees and charges in chapter 13 cases. A working group of the Subcommittee was formed to give further thought to this issue and to present its suggestions for discussion during the Subcommittee's August 14 conference call. **Based on its discussions and careful consideration of the issue, the Subcommittee recommends that Rule 3001(c) be amended and that a new Rule 3002.1 be adopted to provide a uniform, national procedure in chapter 13 cases for the disclosure of postpetition mortgage fees, expenses, and charges and other amounts required to be paid to cure arrearages and maintain mortgage payments pursuant to § 1322(b)(5).** The Subcommittee suggests that this proposal be forwarded to the Standing Committee with the recommendation that preliminary drafts of these rule changes be published for comment in August 2009.

This memorandum provides some background information about the problem and approaches that have been attempted or suggested to address it, the reasons for recommending national rules on the subject, and the Subcommittee's proposal for amendments to Rule 3001(c) and new rule 3002.1.

The Problem

The problem that has arisen in chapter 13 cases throughout the country was well

described by Judge Magner in a recent decision:

> A debtor that completes his plan by paying off his lender's entire arrearage and postpetition installments may find himself in foreclosure the day after a discharge is granted, based on unpaid and undisclosed post confirmation charges and fees. This result is clearly at odds with the notion of providing a successful debtor a fresh start.

Jones v. Wells Fargo Home Mortgage (*In re* Jones), 366 B.R. 584, 596 (Bankr. E.D. La. 2007). The central cause of this problem is the lack of notice of the assessment of postpetition fees and charges by mortgage lenders and servicers ("mortgagees"). These undisclosed charges, which the mortgagees say are authorized by the mortgage agreement, include attorneys fees, bankruptcy fees, late fees, inspection fees, and others.[1] In some cases, mortgagees have applied payments that were intended to cure arrearages or to maintain the current monthly mortgage obligation to these postpetition charges, thus leading to claims of default under the plan. In other cases the postpetition charges have not been revealed until after the debtor has emerged from chapter 13, believing that she is current on all her mortgage payments. If the debtor is unable to pay these amounts, she faces foreclosure notwithstanding the successful completion of her plan. Moreover, because the charges were not disclosed while the case was pending, the debtor was deprived of the opportunity to dispute their legitimacy in the bankruptcy court, as well as the opportunity to modify her plan to provide for payment of any appropriate charges.

Current Approaches to Address Problem

A variety of approaches have been either adopted or proposed by different groups to prevent chapter 13 debtors from being blindsided by undisclosed mortgage charges.

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[1] Additionally, in some cases debtors have alleged that the mortgagees have assessed, either during the bankruptcy case or afterwards, prepetition charges that were not included in their proofs of claim.

1. Proposed federal legislation. The problem of undisclosed mortgage fees in chapter 13 has been brought to the attention of Congress, and several bills have been introduced that address the issue. So far neither house has voted on any of the bills, and the prospect for enactment of such legislation remains uncertain.

H.R. 3609, as amended by the Conyers-Chabot Substitute and reported favorably out of the House Judiciary Committee, contains a provision that is also included in two Senate bills, S. 2136 (reported favorably out of the Committee on the Judiciary) and S. 2636 (placed on the Senate legislative calendar). In almost identical language these bills contain provisions entitled "Combating Excessive Fees" that would amend § 1322(c) of the Bankruptcy Code to require mortgagees to file notice with the court of any fees, costs, or charges that arise during the pendency of the case. That notice would have to be filed no later than one year after the charges were incurred or sixty days before the conclusion of the case, whichever is earlier. These charges could be added to the secured debt provided for by the plan only if they were "lawful, reasonable, and provided for in the underlying contract." If the mortgagee failed to provide timely notice of the charges, that failure would constitute a waiver of a claim for the charges "for all purposes," and any attempt to collect the charges would constitute a violation of the automatic stay or discharge injunction.

These bills therefore seek to combat the problem by requiring the mortgagee to provide notice of postpetition charges while the chapter 13 case is pending, giving the court authority to determine the extent to which the charges are "lawful, reasonable, and provided for in the underlying contract," and prohibiting the collection of the charges if the required notice is not provided. Unfortunately, the timing provision of the bills is flawed. Because the date on which a

chapter 13 case is closed is not a specified day or one knowable in advance,[2] it would impossible for a mortgagee or anyone else to know when the deadline of "60 days before the conclusion of the case" had arrived.[3]

2. Approaches in the bankruptcy courts: local rules, standing orders, model plans, and court decisions. Attempts to address the problem that have actually been implemented have occurred at the bankruptcy court level. A majority of the bankruptcy courts that have imposed a requirement of disclosure of mortgage charges in chapter 13 cases have tied the requirement to the seeking of relief from the automatic stay. A few courts, however, have adopted model plan provisions requiring periodic or final itemized reports by the mortgagee of postpetition mortgage obligations. Finally, some courts have in specific cases granted relief for debtors against mortgagees who have attempted to collect undisclosed pre- or postpetition charges. The discussion that follows provides some examples of the main approaches that courts are currently taking but does not purport to be a comprehensive review of all the variations among the districts.

a. Disclosure in connection with relief from stay motions. One example of this approach is provided by the recent General Order issued by the bankruptcy judges in the Southern and Eastern Districts of New York. This order requires mortgagees seeking relief from the automatic stay in chapter 13 cases (as well as chapter 7 and 11 cases filed by individuals) to attach to their

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[2] Under Rule 5009 there is a presumption that a chapter 13 case has been fully administered, thus allowing the case to be closed under § 350, if 30 days passes after the trustee files a final report and final account and no objection has been filed.

[3] Some current and former members of the Advisory Committee have also expressed concern about the inclusion of filing deadlines in the legislation, believing that to be a procedural matter more appropriately left to the rule making process.

motion a completed worksheet issued by the court as a local form. Among other things, this worksheet requires the disclosure of information regarding the amount of the alleged postpetition default, including the following information: when each missed payment was due; the amount due; the amount received; the amount applied to principal; the amount applied to interest; the amount applied to escrow; and the amount of any late fee charged. The movant must also state the following postpetition charges it seeks from the debtor: attorney's fees in connection with the motion; its filing fee for the motion; and any other postpetition attorney's fees, inspection fees, appraisal fees, forced placed insurance provided by the movant, other advances or charges, and the amount held in suspense by the movant.

Although the General Order does not state the consequence to the mortgagee of not providing the required information, presumably a failure to comply would result in denial of the motion for relief from the stay. The debtor, of course, may dispute any of the asserted amounts in his opposition to the motion.

The approach of tying disclosure of postpetition charges to entitlement to relief from the automatic stay is aimed at ensuring that debtors who are making payments under their chapter 13 plans and directly to mortgagees will not lose their houses during the pendency of the case based on unknown or erroneous charges or application of payments. The mortgagee must reveal in detail the basis for the claim of default, including how payments have been applied and what postpetition charges have been assessed. The court is then in a position to rule on any disputes over these allegations. This approach, however, does not address the situation of a mortgagee who waits until after the bankruptcy case is successfully completed and the stay is terminated – at which point the debtor believes that the mortgage is current – to declare a default and initiate

foreclosure. As described below, some courts have imposed a disclosure requirement to deal with that situation.

b. Periodic or final disclosure requirement. The Bankruptcy Court for the Northern District of Illinois has adopted a mandatory model chapter 13 plan that contains several provisions concerning the home mortgage obligation and imposes a final disclosure requirement on the mortgagee. First it provides that if the debtor makes all payments to cure the prepetition arrearages in the amount specified in the plan and all required postpetition payments, "the mortgage will be reinstated according to its original terms, extinguishing any right of the mortgagee to recover any amount alleged to have arisen prior to the filing of the petition."

Second the plan requires the trustee within thirty days of making the final cure payment to serve a notice on the mortgagee, debtor, and debtor's attorney that sets out the following consequences of the completion of those payments:

- all prepetition obligations to the mortgagee have been satisfied;
- the mortgagee is required to treat the mortgage as fully current unless the debtor has failed to make timely payment of postpetition obligations;
- if the debtor has failed to make timely payment of any postpetition obligation, the mortgagee must "itemize all outstanding payment obligations as of the date of the notice, and file a statement of these obligations with the court," with notice to the trustee, the debtor, and the debtor's attorney, within sixty days of the service of the notice by the trustee;
- if the mortgagee fails to file such a statement within the required time, it is "required to treat the mortgage as reinstated according to its original terms, fully current as of the date

of the trustee's notice;"

• if the mortgagee does file such a statement within the required time, the debtor may challenge the accuracy of the statement within thirty days of its service by filing a motion with the court, in which case the court will resolve the challenge as a contested matter; and

• the debtor may propose a modified plan to pay any additional amounts that the debtor does not contest or that the court finds to be due.

Finally the model plan provides that any postpetition costs of collection, including attorney's fees, that are incurred before completion of the cure payments may be added to the cure amount on court order; otherwise, they must be sought under the procedure for postpetition charges described above.

The Northern District of Illinois plan requires disclosure at the end of the case (after all cure payments have been made) and declares the mortgage to be current if outstanding amounts are not revealed or are not sustained by the court. That procedure is intended to ensure that a debtor who successfully completes a plan will emerge from bankruptcy with a fully current mortgage. These provisions alone, however, do not address the need for disclosure of postpetition charges when the mortgagee seeks relief from the stay during the case due to the debtor's alleged default on his payments. The Central District of California plan, by contrast, has a model plan addendum that requires periodic reporting throughout the case. It therefore provides for the disclosure of information that will be relevant in both the relief-from-stay situation and the post-bankruptcy attempt to foreclose.

c. Bankruptcy court decisions. Unlike the districts discussed above that have adopted

generally applicable requirements for the disclosure of postpetition mortgage charges, some bankruptcy courts as the result of litigation have imposed such requirements on particular mortgagees or have recognized debtors' causes of action against particular mortgagees for collecting undisclosed charges during or after the chapter 13 case. This section discusses two of those decisions and illustrates the diversity of opinion that exists concerning the bankruptcy courts' authority in this area.

Perhaps the most far-reaching decision is Judge Elizabeth Magner's decision in Jones v. Wells Fargo Home Mortgage (*In re* Jones), 366 B.R. 584 (Bankr. E.D. La. 2007). The chapter 13 debtor in that case confirmed a plan under which the trustee was to remit payments to Wells Fargo to cure the prepetition arrearages, and the debtor was to pay directly to Wells Fargo the current mortgage payments and an agreed-upon amount to cure a postpetition default. After the debtor received court permission during the case to refinance the mortgage, it received a payoff statement from Wells Fargo indicating without explanation an amount greater than the debtor had expected. In order to go forward with the refinancing, the debtor paid Wells Fargo the specified payoff amount, but he later filed an adversary proceeding to recover excess funds paid.

Judge Magner ruled in the debtor's favor. First the court held that Wells Fargo had miscalculated the prepetition past-due balance and that it had improperly collected prepetition charges that were not included in its proof of claim. Second the court held that, contrary to the terms of the plan, Wells Fargo had applied current monthly mortgage payments to prepetition arrearages, thus creating a postpetition default and allowing it to collect interest to which it was not entitled. The court further held that Wells Fargo was not entitled to collect any attorney's fees incurred during the postpetition, preconfirmation period because it had not sought approval

of these fees under § 506(b) and Rule 2016(a). Judge Magner also disallowed Wells Fargo's entitlement to post-confirmation attorney's fees and charges because it had failed to sustain its burden of proving that the fees and charges were reasonable, as required by state law and the loan agreement.

Turning to the remedy to which the debtor was entitled, Judge Magner held that Wells Fargo had committed a willful violation of the automatic stay. According to the court, "Wells Fargo's failure to disclose other fees or request permission of the Court to seek their payment from estate property resulted in an illegal collection of fees not due from estate property and violated the automatic stay." 366 B.R. at 600. Judge Magner stressed that the mortgagee in this case had not just assessed postpetition charges, but had actually collected them from payments intended for other purposes, thus violating the confirmation order as well. As a matter of state law, the debtor was entitled to a return of the amounts paid that the court had disallowed. Furthermore, under § 362(k) the debtor was entitled to recover his actual damages, including costs and attorney's fees.

In a subsequent opinion, 2007 WL 2480494 (Aug. 29, 2007), Judge Magner awarded the debtor over $67,000 in attorney's fees and costs pursuant to §§ 362(k) and 105(a). The court then concluded that an additional sanction was warranted for Wells Fargo's "egregious" conduct, actions that the mortgagee admitted "were part of its normal course of conduct, practiced in perhaps thousands of cases." *Id.* at * 4. Rather than awarding punitive damages, however, the court accepted Wells Fargo's alternative proposal "to revise its practices in connection with all loans administered in the Eastern District of Louisiana."

The proposal that the court accepted and ordered Wells Fargo to follow requires the

mortgagee to file annually with the court, deliver to each of its chapter 13 debtors in the district, and serve on debtor's counsel and the trustee a statement itemizing all charges or fees that Wells Fargo alleges have accrued in the previous calendar year. The statement in each case must be filed, delivered, and served between January 1 and February 28, and the debtor may file an objection to any charges by March 31. In the absence of an objection, the listed charges will be approved by the court. The failure of Wells Fargo to file an annual statement in any case will constitute an admission that no charges accrued during the previous year. When a chapter 13 case is successfully completed, Wells Fargo must submit a final statement at least 10 days before the entry of a discharge order. This statement must itemize all postconfirmation charges that have accrued since January 1 of that year.

Other bankruptcy courts have agreed with some aspects of the *Jones* decisions. *See, e.g.*, Sanchez v. Ameriquest Mortgage Co. (*In re* Sanchez), 372 B.R. 289 (Bankr. S.D. Tex. 2007) (holding that postpetition, preconfirmation charges were per se unreasonable because of failure to file Rule 2016 application, postconfirmation charges were per se unreasonable because of failure to disclose them, and that the mortgagee violated the automatic stay by applying payments of estate property to the disallowed postpetition charges); Padilla v. Wells Fargo Home Mortgage, Inc. (*In re* Padilla), 379 B.R. 643 (Bankr. S.D. Tex. 2007) (rejecting view that erroneous application of plan payments violates the automatic stay, but holding that mortgagee must file Rule 2016 application for all postpetition fees and expenses, that application of payments to charges not allowed by contract and state law violates the confirmation order, and that debtor is entitled to disgorgement or damages for wrongful collection of postpetition charges). According to a February 21, 2008 memo from Meredith Mathis of the Bankruptcy Court Administrative

Division of the Administrative Office of the U.S. Courts, at least nine bankruptcy courts in addition to the Eastern District of Louisiana have created a CM/ECF event that allows a limited group of users to notice changes in mortgage payments.[4]

A recent decision by former Advisory Committee member Judge Eric Frank, by contrast, rejected the existence of a requirement under current law for a mortgagee to give notice or seek court approval of postpetition charges for which payment will be demanded after the bankruptcy case is closed. In Padilla v. GMAC Mortgage Corp. (*In re* Padilla), 389 B.R. 409 (Bankr. E.D. Pa. 2008), a chapter 13 debtor sought relief on several grounds against GMAC because of its collection of several previously undisclosed bankruptcy costs and fees when she sold her house immediately after emerging from bankruptcy. Judge Frank largely rejected the debtor's claims.[5] He rejected all of the claims that GMAC violated the discharge injunction by its collection of the fees, since the debtor received no discharge of this § 1322(b)(5) debt. He also declined to entertain a claim of contempt of the confirmation order. Even if a creditor acts contrary to the terms of a confirmed plan, Judge Frank reasoned, contempt does not lie because "the confirmation order is not a coercive court order directing creditors to act in conformity with the terms of a confirmed plan." *Id.* at 420.

Most significantly the court rejected the debtor's claim that GMAC violated the terms of

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[4] Ms. Mathis reported that mortgagees are using CM/ECF to notice changes in mortgage payments in the four of the nine courts in which chapter 13 trustees make the mortgage payments, but are not using the system in the other five districts in which debtors make the payments directly.

[5] Even though it apparently was not clear exactly when the fees were incurred, the court accepted the debtor's attorney's representation that they were limited to fees incurred either prepetition or postpetition, preconfirmation.

the plan and § 1327(a) by collecting attorney's fees that it had failed to disclose or obtain court approval for during the case. Judge Frank's thorough analysis of the Code and Bankruptcy Rules revealed to him no provision that imposed an obligation on the mortgagee to either disclose or gain approval of these postpetition fees. In the absence of such a duty, there could be no waiver of the fees or violation of the terms of the plan. While he agreed with the *Jones* decision that from a policy standpoint "the bankruptcy system should impose disclosure and/or other procedural requirements on a secured creditor's right to assess legal expenses postpetition in a case in which the creditor's claim is being treated and cured in a confirmed chapter 13 plan," he disagreed that either §§ 506(b) or 1322(b)(5) or any other Code provision imposed those obligations. Neither provision imposes any procedural deadline for disclosing or seeking the payment of fees in a case in which the secured debt is to be cured and maintained under the plan. Judge Frank reasoned that "[b]ecause there is no discharge and the parties' contract passes through the chapter 13 case unaffected, it follows that after the conclusion of the bankruptcy case the secured creditor may collect all charges lawfully falling due under the contract that were not paid during the pendency of the bankruptcy plan." *Id.* at 440.

Judge Frank also rejected the argument accepted in *Jones* and the Texas *Padilla* case that Rule 2016 imposes a duty on the mortgagee to seek judicial approval of the postpetition fees and charges. At no point did GMAC seek payment of these fees from the estate, as required for the rule to apply; instead it only sought payment from the debtor after the estate had ceased to exist. Additionally, the court pointed out, unlike some other districts, there is no local rule or standing order in the Eastern District of Pennsylvania that requires disclosure or court approval of postpetition mortgage charges.

The one claim that the court did not dismiss was the debtor's claim that GMAC violated the Bankruptcy Code by collecting prepetition charges not included in its proof of claim after the debtor had cured the prepetition default under the plan. Judge Frank held that this conduct was inconsistent with the terms of the plan and therefore violated § 1327(a), which makes the plan binding on creditors. He also held that the violation is redressable by the court under § 105(a).

3. Best practices. Another effort to regulate postpetition mortgage charges has been undertaken by a subcommittee of the National Association of Chapter Thirteen Trustees ("NACTT") that also includes mortgage servicers, mortgagees, and creditors' counsel. They have produced a document entitled "Best Practices for Trustees and Mortgage Servicers in Chapter 13." This approach sets forth practices that it is hoped trustees and mortgagees will agree to follow on a voluntary basis.

More than two pages of suggested practices are included in the document, but among them are the following of particular relevance:

- The mortgagee should provide the debtor and file with the court a notice of and reason for any payment change.
- The mortgagee should annually provide the debtor and file with the court an escrow analysis and a notice of any payment change based on that analysis.
- The mortgagee should attach a statement to a formal notice of payment change that itemizes all postpetition costs and fees not previously approved by the court and that have become due since the prior escrow analysis or date of filing. If there is no objection to these charges, the trustee should take steps to provide for their payment under the plan (either as a separate or amended arrearage claim or by means of a modified plan).

• The mortgagee should monitor postpetition payments and should not seek to recover late fees unless a delay in payment is due to actual debtor default, rather than systemic delay.

• Payments should be properly applied to prepetition arrearages or ongoing mortgage payments, as the case may be, and the trustee's voucher should indicate the purpose of any payment.

• At the close of the case or entry of discharge, in jurisdictions in which trustees make all the mortgage payments, the mortgagee should review the trustee web site or the National Data Center ("NDC") to determine if there are any payment discrepancies with its accounting system.

The Subcommittee was informed that, because of their desire for uniformity of practice throughout the country, some of the largest mortgagees have indicated that they will comply with these best practices. Because of the voluntary nature of this approach, however, no mortgagee can be forced to comply, and there are no consequences for a failure to do so.

4. A model local rule. A committee of the National Conference of Bankruptcy Judges, headed by Judge Ray Lyons of the District of New Jersey, intends to draft a model rule governing the disclosure of postpetition mortgage charges that could be adopted as a local bankruptcy rule by districts throughout the country. This rule, which has not yet been drafted, is intended to be mandatory and to provide consequences for noncompliance. It will also provide time limits for the raising of objections to any mortgage fees by the debtor.

Should There Be a National Bankruptcy Rule Requiring the Disclosure of Postpetition Mortgage Charges in Chapter 13 Cases?

The problem of undisclosed and sometimes questionable postpetition mortgage charges is affecting chapter 13 cases nationwide. Currently the only mandatory procedures regulating the disclosure of those charges are ones imposed by various local rules, forms, standing orders, and court decisions. Many districts have yet to adopt any procedures, and in others they are limited to the relief-from-stay situation. Even among the districts that require disclosure of charges before the closing of the case, there are significant differences in the timing and the nature of the disclosure that is required. This lack of uniformity presents difficulties for national lenders and provides uneven protection for debtors around the country. With the prospect for congressional action to address the problem uncertain, a national bankruptcy rule providing a uniform procedure in all bankruptcy courts seems desirable.

A proposal for any such rule that requires disclosure and provides consequences for the failure to comply may face arguments that the rule is inconsistent with § 1322(b)(2)'s prohibition of the modification of home mortgages and that it exceeds the rule making authority under 28 U.S.C. § 2075. The Subcommittee believes that these arguments are without merit. Section 1322(b)(2), of course, is subject to § 1322(b)(5), which allows a plan to "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending." In order for debtors to take full advantage of the option that § 1322(b)(5) provides, they and the trustees must know throughout the case the amount that is in default and the current amount of the payments that are being maintained. A rule that imposes requirements for the disclosure of

this information in a chapter 13 case does not unlawfully modify the mortgage; it merely provides a procedure, much like a discovery provision, that facilitates implementation of the cure and maintenance provision. As Judge Frank noted in the *Padilla* case:

> The debtor's performance of the postpetition contractual obligations takes place within the context of a court supervised financial rehabilitation process. Any assessments by the secured creditor for legal [or other] expenses incurred postpetition constitute part of the amount necessary to cure the default and directly impact the debtor's prospects for a successful chapter 13 rehabilitation. The failure to notify the debtor can have pernicious consequences.

389 B.R. at 437.

Judge Frank went on to determine that § 1322(b)(5) itself does not impose a disclosure duty or a procedural deadline on mortgagees. He pointed out, however, that "there are other mechanisms for establishing those requirements. . . . If a procedural vacuum exists that needs to be filled, it is more appropriate to do so either through the enactment of rules of court or the confirmation of chapter 13 plans that include necessary and appropriate procedural provisions addressing the subject matter." *Id.* at 441-42 (footnotes omitted). Because, as he explains, bankruptcy courts are divided over whether to confirm plans containing such procedural requirements (*see id.* at 442 n.57), the adoption of a bankruptcy rule is the only way to achieve a uniform solution (unless Congress enacts a statutory provision).

Proposal for National Bankruptcy Rules

The Subcommittee recommends that the problem of disclosure of the amounts that must be paid to cure prepetition mortgage defaults and to maintain mortgage payments during the course of a chapter 13 cases be addressed in two rules. First the Subcommittee recommends the following amendment to Rule 3001(c) to address the information that must be provided in a

proof of claim regarding amounts claimed in addition to principal, amounts required to cure prepetition defaults, and the status of escrow accounts.

RULE 3001. Proof of Claim

Latest version of suggested amendments found at the beginning of this file.

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